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No. [redacted] 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Petitioner

v.

CAJO TRADING, INC.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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No. 1440

UNITED STATES OF AMERICA,
Petitioner

v.

CAJO TRADING, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Respondent prays that the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the United States be denied.

OPINIONS BELOW

The Customs Court, First Division (56 Cust. Ct.) 143, C.D. 2621, the Court of Customs and Patent Appeals (2 Cust. Bull. No. 10, p. 78, March 6, 1968) both held for the Plaintiff (the Respondent here). See Appendix Petitioner's Petition.

JURISDICTION

The judgment of the Court of Customs & Patent Appeals was entered on February 15, 1968. A timely petition for

Writ of Certiorari was filed by the United States on May 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

1. *On Petition For Writ:* Whether the decision below is in conflict with decisions of this Court; whether there is a conflict in the decisions of the Court below, and whether a substantial federal question of substance is involved.

2. *If Writ is Granted:* Whether a "liquidation" by the Collector of Customs of an entry of imported articles in accordance with a void Executive Order of the President is a liquidation as required by law which becomes final under Sec. 514 of the Tariff Act of 1930 if not protested in writing with the Collector within 60 days after the Collector's action. In essence, if the writ is granted, the question is whether a liquidation pursuant to a void duty rate (the Presidential Proclamation being an exercise of a legislative function properly delegated but improperly exercised) is also void.

STATUTES INVOLVED

The relevant provisions of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505 are set forth at pages 2 and 3 of the Petition.

STATEMENT

The merchandise involved here, consisting of spring clothespins, was liquidated by the Collector of Customs at New York on December 27, 1957, and the duties were assessed at the rate of 20 cents per gross as directed by Presidential Proclamation No. 3211 (T.D. 54493). No protest was filed by the Respondent against this liquida-

tion within the 60 day limitation period prescribed by Section 514.

Thereafter, on October 18, 1961, the Customs Court, First Division, in its decision in *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, held that Presidential Proclomation No. 3211 was "void." Accordingly, it held that the 20% rate of duty applied by the Collector was not the proper rate of duty but that instead the duty rate should have been 10% per gross prescribed by an earlier legally issued Presidential Proclamation.

The decision in *Falcon Sales*, not having been appealed, Respondent on January 25, 1963, believing the December 27, 1957 Collector's liquidation to be as void as Presidential Proclomation No. 3211 had been held to be, served on the Collector a written demand to liquidate the entry as provided by law. The Collector refused to do so and Respondent filed the protest which has given rise to the present litigation.

Respondent's position that a valid liquidation had never taken place and that the entry should be liquidated as provided by law at the valid duty rate of 10¢ per gross was upheld by the Customs Court. That Court concluded that there had been no valid liquidation because the December 27, 1957 "liquidation" was pursuant to a *void* Presidential Proclamation. Accordingly, the Respondent's protest was dismissed as premature (protests may be filed only after a liquidation "as provided by law" has taken place), the Court holding that the Collector was under an obligation to liquidate the entry "as provided by law" under Sec. 505 of the Tariff Act of 1930.

In reaching its decision, the Customs Court relied on *United States* v. *C. O. Mason, Inc.*, 5 CCPA 107, CAD 994, certiorari denied 379 U.S. 399, 13 L. ed. 2d 701 (1965). In that decision the Court of Customs and Patent Appeals held that the Sec. 514 sixty-day protest provision did not apply to a liquidation under a statute *later* held to be un-

constitutional, because the *voidness* of the statute made the subsequent liquidation *equally void.*

In the decision of the Customs Court in the present litigation, the Court found there was no valid distinction between a liquidation based on an unconstitutional statute and one based, as here, on an unconstitutional Proclamation of the President issued pursuant to the Trade Agreements Extension Act—both were equally void.

The United States appealed that decision to the United States Court of Customs and Patent Appeals. By a divided 3-2 opinion,[1] that Court affirmed the decision of the lower Court, (Petitioner's Brief, App. 23-24) saying:

> "We have the same difficulty as did the Customs Court in finding a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential proclamation on the other—the effect is the same in both cases. * * * we do not think it can fairly be said that Congress intended Section 514 to control in either instance."

The United States now petitions for issuance of a Writ of Certiorari permitting this Court to review the decision below. It relies primarily on the contention that the decision may be applied in matters far beyond the limited field of customs law and the provisions of Sections 505 and 514 of the Tariff Act of 1930.

REASONS FOR DENYING THE WRIT

The decision of the Courts below was a just one and to reverse it would violate basic principles of justice and fair play.

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[1] The opinion of each of the five Judges of the CCPA was that the Appellee's protest should be dismissed, the majority holding it should be dismissed because it was filed *in advance of any valid liquidation* having occurred and the minority holding that it should be dismissed because it was filed more than 60 days after the December 27, 1957 liquidation which took place pursuant to the void Presidential order as to the rate of duty to be applied to entries of the article involved.

Rule 19 of the Rules of this Court specifies the considerations which are to govern Review on Certiorari. The case at hand does not qualify for review by this Court.

(a) The question involved is not a question *of substance*, or a case decided contrary to applicable decisions of this Court.

(b) The decision below is not in conflict with the decisions of the Court of Customs and Patent Appeals, the only appellate court dealing with customs problems. Instead, the decision is in accordance with that Court's decision in *Mason*.

(c) The issues do not involve a state or territorial question.

(d) The decision below does not involve an important question of federal law.

(e) The decision below has not decided a federal question in a way in conflict with any decision of this Court.

(f) The decision below does not depart from any accepted and usual course of judicial proceedings.

ARGUMENT

Unauthorized acts of government officials often have a substantially damaging effect on the citizens affected. When such an act takes place, the government and the courts should minimize and not perpetuate this damage. To hold that a liquidation based on a void act of the President is valid because a statute of limitations barred any question regarding the validity of that liquidation would be to give validity indirectly to what is otherwise invalid. Some might require a man lift himself by his bootstraps, but not the Courts where justice cannot thereby be served.

In order to induce the Court to grant certiorari the Petitioner argues that the decision of the Court below and

the principles therein enunciated may be applied in a variety of circumstances—some in the area of customs law not involving void statutes and void Presidential Proclamations and some far afield. Petitioner erroneously assumes:

(a) That the decision of the court below would apply to all improper liquidations made by the Collector.

(b) The decision is of importance as a precedent to federal statutes other than the customs statutes, including patent and trademark cases.

On the basis of these assumptions the Petitioner argues that the decision involves an important federal question of substance, i.e., the maintenance of the validity of the specific terms of all federal statutes of limitations.

We submit that both the assumptions made by Petitioner and the conclusions drawn therefrom as to the federal question involved and its importance are unjustified.

Both the Customs Court and the majority of the Court of Customs and Patent Appeals could find no distinction between the case at hand and the decision in *Mason, supra.* In other words, neither found any distinction between a liquidation by the Collector *under a void* statute and one under *a void Presidential Proclamation.* The Customs Court expressed concern about whether its decision in the case at hand was an extension of the *Mason* decision relating to a void statute and the minority in the Court below believed it to be an unjustified extension, the implications of which could not be readily determined.

But the decisions of both Courts were right. There is no distinction. *Mason* held that a liquidation under Sec. 505 under a void statute was not a liquidation "as provided by law." The statute, being void *ab initio*, all things flowing therefrom were obviously void for they were not "as provided by law."

The case here involves a liquidation pursuant to a void Presidential proclamation adopted pursuant to a Trade Agreements Extension Act. While the proclamation was issued by the President, he was acting in assistance of the Legislative Branch, and the proclamation partook of the nature of legislation in that it sought to establish a new rate of duty, something reserved to the Congress under Article I, Sections 1, 7 and 8 of the Constitution.

But it has long been held by this Court that the Congress may properly delegate to the Executive Branch of the Government the determination of a lawful rate of duty to be applied by the Executive pursuant to declared congressional policies and according to congressionally established standards. As this Court, speaking through Mr. Justice Hughes, put it in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, at p. 421, 79 L. ed. 446 (1935) the Congress is vested exclusively with legislatively powers under the Constitution, and

> "manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility . . . ."

The exercise of the delegated power (within the standards and pursuant to the policies declared by the Congress) is, according to Justice Douglas, but "*one stage of*

the legislative process" both "*in substance and to a great extent in form.*" [Emphasis added.] *United States* v. *Bush & Co.*, 310 U.S. 371, 379, 84 L. ed. 1259 (1940). In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 77 L. ed. 796 (1933) Justice Cardozo, in discussing the congressionally authorized process of the initiation of an increased rate of duty by means of a Presidential Proclamation after receipt of Tariff Commission advice, pointed out (P. 305):

> "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions *is in substance a delegation, though a permissible one, of the legislative process.* [Emphasis added.] *Hampton Jr. and Co.* v. *United States*, 276 U.S. 394, 72 L. ed. 624, 48 S. Ct. 348; *Buttfield* v. *Stranahan*, 192 U.S. 470, 48 L. ed. 525, 24 S. Ct. 349; *Field* v. *Clark*, 143 U.S. 649, 36 L. ed. 294, 12 S. Ct. 495. The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees *when the legislative process was in the hands of Congress and no one else.*"

In the decision in *Hampton, Jr. and Co.* cited in the above quotation from the opinion of Judge Cardozo, Chief Justice Taft said at page 409:

> "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

In referring to the decision of this Court in *Hampton, Jr., supra*, the Court of Customs, in commenting on the constitutionality of a power delegated by Congress to the President to set rates of duty under prescribed circumstances, pointed out:

> "In its essentials, it required on the part of the Congress the establishing of certain criteria to guide

the President and the prescribing of certain limits of change. On the part of the President it required the completion of certain conditions precedent and the use of a proclamation *to effect the change in the law.*

"It is not open to doubt that, in the case of the flexible tariff provisions, it is the proclamation of the President which changes *the law.* The President, acting as the agent of the legislature, proclaims new tariff rates. *The proclamation is akin to the legislative act.* It is not merely declaratory of a situation which exists without it—*it is the law itself.*

"As has been said, the use of the device of delegating authority to the President to change tariff rates under an intelligible principle and in accordance with certain conditions and limitations was incorporated into the Trade Agreements Act and into the extensions thereof here involved. Retained as a basic and integral part of the device was the requirement that the President *proclaim the modifications of duties,* restrictions upon imports, or customs or excise treatment of articles covered by foreign trade agreements. The Act refers, not to the 'agreed' duties and other import restrictions, but to the 'proclaimed' duties and other import restrictions, a clear indication that Congress considered the trade agreement to be in the nature of a condition precedent to the issuance of a valid proclamation, *but that the change in the law is effected, not by the trade agreement, but by the proclamation. By this means, not only is the inherently legislative character of the act preserved,* but also the constitutional separation of powers is maintained." *American Bitumuls & Asphalt Co., et al* v. *United States,* 37 U.S. Cust. Rep. 58, 63, CD 1799. [Emphasis in part supplied.]

The legislative nature of an act of the executive for which there is no authority other than the delegation of legislative power is also confirmed by the opinion of Chief Justice Taft in *Mahler* v. *Eby,* 264 U.S. 32 at page 44, 44 Sup. Ct. 283, 68 L. ed. 549:

> "It is essential that when the executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise . . ."

Essentially, therefore, a Presidential action such as Proclamation 3211 under which the merchandise in this appeal was allegedly liquidated, was legislative in nature, albeit an action of the Executive within the powers delegated to the Executive by the Congress. And in this lies a rational identification with the unconstitutional statute situation involved in *Mason*. Also—in this fact lies the essential difference between the case at hand and the much broader circumstances Petitioner asserts the decision below could be extended to, such as mistakes by the Collector, whimsical actions by an administrative official in the field of patents and trademarks and in fact all federal statutes of limitations.

When the Collector mistakenly classifies merchandise under a wrong section of the statute, his action is not legislative in nature. He had no delegated authority to change the law—his decision is not law. The President, however, under the Trade Agreements Extension Act, was authorized to issue proclamations under stated conditions which changed the law pursuant to the previously delegated Congressional authority. It cannot be denied that a *validly issued* Proclamation under that Act constitutes the law from and after date of its issuance. Whether it be an Act of Congress setting a rate, or a Proclamation of the President validly issued, it is legislative in character in that it establishes a new rate. Not so with the mistakes or whimsical acts of other administrative officials for in performing such acts they are engaged in administration pure and simple. Not so with mistakes by the Courts in the application of laws, for that is judicial, not legislative in nature.

And there lies the dividing line which we believe made it difficult for the majority below and the Court of Customs to distinguish between *Mason* and the case here:

> "We have the same difficulty as did the Customs Court in finding a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential Proclamation on the other—the effect is the same in both cases."

Even the minority of the Court below did not contend that the decision in *Mason* was erroneous. Instead, it stated:

> "We have gone so far as to make a judicial (not Congressional) exception in the case of unconstitutional statutes. Now that it has been shown to us * * * where so-called 'logical' extensions of that exception clearly lead, it behooves us to stop where we are and make no further exceptions, for we are on a collision course with express Congressional intent."

The difficulty with the minority was that it failed to perceive that both *Mason* and *Cajo* involved instances in which "the law" pursuant to which the liquidation was made was void. And not only *Mason* is right but so is *Cajo*, for a Presidential Proclamation becomes "the law" unless, as here, *it is void*—and all actions taken by the Executive Department pursuant to a liquidation pursuant to a *void* "law" must *perforce* be *void.*

Petitioner fails to cite any decision of the Court below with which the decision in *Cajo* is in conflict. In fact, the decision below was held by that Court to be indistinguishable from *Mason*—which this Court refused to review. Similarly it fails to cite any decision of this Court which is in conflict with the decision below. Instead, the decisions of this Court are in accord with the conclusions of the Court below and with those in *Mason.*

The doctrine of void liquidations derives from a long line of Supreme Court decisions culminating in *United States* v. *Passavant*, 169 U.S. 16 (1898).

In *Passavant* the appraiser had included in his appraisement the amount of a tax remitted to the exporter

by the exporting country. The importer did not appeal to the Board of General Appraisers for reappraisement, but instead protested after liquidation. Section 13 of the Customs Administrative Act of 1890 [1] made the decision of the appraiser "final and conclusive as to the dutiable value of such merchandise against all parties interested therein" if an appeal to reappraisement were not taken within two days after appraisement. This limitation, the government contended, deprived the Board and the appellate courts of jurisdiction to determine the appraisement issue.

The Court, however, overruled the govenment's contention—

> ". . . while the general rule is that the valuation is conclusive upon all parties, nevertheless, the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute." (169 U.S. 21) [2]

and proceeded to hold, on the merits, that the remitted tax was not properly a part of dutiable value.

The *Passavant* rule has been expressly followed by this Court and the Court of Customs & Patent Appeals.[3] After the establishment of the Customs Court in 1926,[4] the rule of *Passavant* was judicially modified to the extent that when, upon protest, a liquidation was voided for any reason requiring further appraisement pro-

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[1] 26 Stat. 131, 137.

[2] See also the prior cases reaching the same result. *Oberteuffer* v. *Robinson*, 116 U.S. 499; *Badger* v. *Cusimano*, 130 U.S. 39; *Robertson* v. *Frank Bros. Co.*, 132 U.S. 17; *Erhardt* v. *Schroeder*, 155 U.S. 124; and *Muser* v. *Magone*, 155 U.S. 240.

[3] See *Stein* v. *United States*, 1 Ct. Cust. App. 36, T.D. 31007 (1910) and *Stahel & Co.* v. *United States*, 11 Ct. Cust. App. 430, T.D. 39435 (1923).

[4] c. 411, Secs. 1 and 2, 44 Stat. 669.

ceedings, the cause was remanded to the collector for a new appraisement rather than the court itself determining the appraisement question.[5] Finally, the problem of what to do with appraisement questions resulting from the voiding of a liquidation upon protest was resolved by the Customs Administrative Act of 1938[6] which requires that such questions be remanded for determination by a single judge of the Customs Court sitting in reappraisement.

Thus, *Passavant* established the doctrine that an appraisement will be "impeached," and the liquidation based on it voided, if made on "a wrong principle contrary to law" or if the appraiser or collector "has transcended the powers conferred by statute," this notwithstanding the statute of limitations which bars the review of appraisement questions if no timely appeal to reappraisement is taken. See *United States* v. *James H. Rhodes & Co.*, 40 C.C.P.A., (Customs) 1 C.A.D. 488 (1952); *James S. Kean* v. *United States*, 20 C.C.P.A. (Customs) 388, T.D. 46186 (1933); *United States* v. *William Heyer*, 31 C.C.P.A. (Customs) 111, C.A.D. 259 (1943); *Stubbs* v. *United States*, 7 Ct. Cust. App. 399 T.D. 36967 (1917).

Thus there is no conflict in the law as developed judicially. The decisions consistently hold that a liquidation tainted with a constitutional infirmity is void. The incorporation of a rate of duty which derives from a Presidential Proclamation judicially declared void as an overstepping by the President of rate setting powers delegated to him by the Congress is no less serious an infirmity than a rate derived from a statute judicially declared to have been unconstitutional.

The decisions of the Court of Customs and of the C.C.P.A. in the field of Customs Law are of particular

[5] See *United States* v. *Tampa Box Co.*, 15 Ct. Cust. App. 360, T.D. 42561 (1928) and especially *United States* v. *Alex Murphy & Co.*, 16 Ct. Cust. App. 461, T.D. 43210 (1929).

[6] Sec. 16(b), 52 Stat. 1084, 28 U.S.C. 2636(d).

application only to the valuation, classification and procedural problems involved in the Customs field. They have not generally been cited as authority or followed in either the trademark or patent fields, nor in decisions of courts of general jurisdiction. The spectre raised by Petitioner that the decision below may lead to a change in federal law relating to statutes of limitation generally, finds no support in the decisions of this or other courts and is without substance.

Finally, the Government argues that this Court should review the decision below because the effectiveness of the Statute of Limitations in Section 514 is at stake here and, perforce, it contends an important federal question is involved. It points out that Section 514 involves *all* decisions of the collector, including the legality of all orders and findings entering into same, as to the rate and amount of duties chargeable.

This is another straw man and without substance. The principle involved here is of limited application. There have been but few cases where a Collector of Customs has acted pursuant to a void statute or Presidential Proclamation and, the government's unwarranted assumption to the contrary, there are not likely to be many in the future. Such cases could only multiply if there was a substantial deterioration in the ability of lawyers advising administrators and lawmakers on the validity of proposed statutes and proclamations.

At page 12 of its petition for writ of certiorari in *Mason*, the government submitted the same reasons it now urges in *Cajo* for granting certiorari. Whatever else the Supreme Court's denial of the government's petition for certiorari in *Mason* may signify, it indicates that this Court was not sufficiently disturbed by the government's recital there of other possible applications to wish to review the holding of the Court below in that case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

JAMES R. SHARP
Attorney for Respondent

June 1968.